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DE FACTO OFFICE

THE supreme court of the state of Ohio declared in 1902 that the charter of the city of Cleveland was unconstitutional because contained in a special act.¹ By this decision all the previous adjudications of that court on that point were squarely reversed, and as a result every important city in the state was left without a constitutional form of local government and with scarcely a single office created in accordance with the constitution. To avoid complete political chaos, six months were given to the legislature to create a new code before the decision should go into effect.

In such a situation the important question arises: Have the official acts of the incumbents of such municipal offices any legal weight at all, or may they be impeached in direct or in collateral proceedings because of illegality in the establishment of the office? Had the courts of Ohio followed the so-called Shelby County² rule, *viz.* that in the absence of a *de jure* office there can be no *de facto* officer, they would have had to declare that all the municipal officers in the state were mere intruders and that all the acts of such officers were null and void; for under that rule the incumbents of offices not in existence *de jure* could not have been recognized as officers *de facto*. But the supreme court of Ohio, a few years before, had distinctly repudiated this rule, asserting that the question whether official acts are to be treated as the acts of a *de facto* officer is in no wise dependent on the existence of a *de jure* office but upon other and broader principles.³

The question is one of practical importance to students of American public law; for it is by no means sure that the courts of any other state in which special legislation is constitutionally

¹ State *v.* Cowles (1901), 64 Ohio St. 162; State *v.* Jones (1902), 66 Ohio St. 453; State *v.* Beacom (1902), 66 Ohio St. 491.

² Norton *v.* Shelby County (1886), 118 U. S. 425.

³ State *v.* Gardner (1896), 54 Ohio St. 24.

prohibited may not, like the Ohio courts in 1902, squarely reverse themselves and declare to be constitutionally non-existent a large number of public offices which for half a century or more have been supposed to be a fixed part of our political system; and in almost every commonwealth it is still an open question whether the so-called Shelby County rule shall or shall not prevail. It is therefore highly desirable to examine the authorities for that rule and to endeavor to determine whether it has any basis either in legal principle or in precedent.

As a first step toward such a determination we must inquire under what circumstances the courts recognize as *de facto* officers persons occupying offices to which they are not entitled.

I

It has always been a principle of the common law of England that one who obtains a public office with no show of right is a mere intruder and acquires no title to the office. But in order that his title to the office may not be impeached in a collateral proceeding, that is in a proceeding to which he is not a party, it is not necessary that he shall have observed all the rules which govern the attainment of the office which he occupies. In order that he may be treated, so far as the ordinary public is concerned, as a legally appointed or elected officer, all that is necessary is that he fall into the class of what are commonly known as *de facto* officers. As Judge Buller said in *State v. Carroll*: "An officer *de facto* is one whose acts, though not those of a lawful officer, the law upon principles of policy and justice will hold valid so far as they involve the interests of the public and of third persons."¹

By writers on the subject a *de facto* officer has been variously defined, but no definition has yet been found which fits all the cases. The earliest case in which a fairly satisfactory answer was given is the English case of *Parker v. Kett*.² In this case a steward *de facto* was declared to be "no other than he who has the reputation of being steward, and yet is not a good steward in point of law." The decision turned upon the fact that the as-

¹ (1871) 38 Conn. 449, 471.

² (1701) 1 Ld. Raymond, 658.

sumption of the office had for so long a time been accepted by the public without dissent as to gain for the incumbent "the reputation of being steward." The test was whether the incumbent had a sufficiently general reputation of stewardship; if so, he was a *de facto* officer. The definition was reiterated a century later in the case of *The King v. The Corporation of Bedford Level*.¹ Here it was held, however, that a deputy could not acquire the reputation of being a principal; and the point was made that to be a *de facto* officer one must have "colorable authority" to the office in question. In almost all the later cases it is indicated that the touchstone for discovering who is a *de facto* officer is the determination of the degree of color of title possessed by the would-be officer. In every instance the officer is holding office without legal right, and the only question is whether he has sufficient color of title to the office and sufficiently general reputation of being an officer to render his title unimpeachable in collateral proceedings. If this question is answered in the affirmative, he is an officer *de facto*; if not, he is a mere intruder. This is what is known as the *de facto* rule.

The American courts have accepted and applied the English rule. They have cited with approval Lord Holt's definition in *Parker v. Kett*, as reaffirmed by Lord Ellenborough in *The King v. The Corporation of Bedford Level*. In the case of *Worth v. Mattison*,² Mr. Justice Daniel, rendering the opinion of the United States supreme court, said:

The courts have concurred, it is believed, without an exception in defining "color of title" [to an office] to be that which in appearance is title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title.

Again the federal court for the district of Oregon, after approving the English cases, said:

Thus it will be seen that the almost unbroken current of authority is against the claim made for the petitioner that no one can be an officer *de facto* under a void law, or an illegal appointment; and admitting

¹ (1805) 6 East, 356.

² (1855) 18 Howard, U. S. 50, 56.

that the judges who tried and heard the action against the petitioner in the state courts were appointed judges of these courts under an unconstitutional act, yet they were at least such judges under color of right and authority, and they were and are . . . judges *de facto*, and their acts are valid and binding as to third persons. Color of title to an office is analogous to color of title to land. The latter does not mean a good title, or even a defective conveyance from one having title, but only the appearance of title, *i. e.* a deed to the premises in the due form of law.¹

The same court also declared that an officer in office by color of right is an officer *de facto*; that his acts as such are valid and binding as to third persons; and that an unconstitutional act is sufficient to give such color to an appointment to office thereunder.

Thus it is seen that the courts of England and of the United States both lay down the rule that in determining whether a man is a usurper, whose official acts are absolutely null and void, or a *de facto* officer, whose acts have the force of *de jure* acts in all except direct proceedings, dependence is placed simply upon the sufficiency of the color of title to his office.²

II

On the other hand there are in the cases and in the text-books many definitions of *de facto* officers and statements based on such definitions which assume that there can be no *de facto* officer unless there is a *de jure* office. Judge Dillon goes the length of declaring:

In this country the doctrine is everywhere recognized that the acts of *de facto* officers as distinguished from the acts of mere usurpers are valid. But in order that there may be a *de facto* officer there must be a *de jure* office; and the notion that there can be a *de facto* office has been characterized as a political solecism without foundation in reason and without support in law; and therefore a person cannot claim to be a *de facto* officer of a municipal corporation where the corporation or

¹ *In re Ah Lee* (1880), 5 Fed. Rep. 899, 913.

² *People ex rel. Kelly v. Common Council* (1879), 77 N. Y. 503, 510; *People ex rel. Howard v. Supervisors of Erie* (1899), 42 App. Div. N. Y. 510, 514.

people have, in law, no power, in any event, to elect or appoint such an officer.¹

Whatever degree of consideration may be attached to these and similar statements, it is of course the decisions of the courts, and not the statements made concerning the grounds of such decisions, that make the law, and it is permissible to disregard such statements, even when made by the judges, in so far as they are inconsistent with or irrelevant to the decision of the points actually involved in the adjudications. Let us then examine the principal cases on this subject and find, if we can, exactly what they have decided.

The question whether there can be a *de facto* officer if there is no office *de jure* is one that does not easily arise except in a country governed by a written constitution; and for this reason we find few cases on the subject in the English reports. Whatever is declared by Parliament to be an office is of course a *de jure* office; and it is only where an office has not been created by Parliament that the question regarding its existence *de jure* can be presented to the courts. Such a case might arise in a manor, as did the case of *Parker v. Kett*. In this case Lord Holt held that although the office was defectively organized, still the stewards were to be considered stewards *de facto*. This decision, while directly in point, is not authoritative as regards the matter of unconstitutional offices in the United States. It is nevertheless useful as showing the trend of the common law.

Among the American cases in which it is asserted that there can be no *de facto* officer unless there be a *de jure* office there are but a scant half-dozen in which this question is really involved. The rest are decided on other grounds. In several of the leading cases it is intimated that all the earlier authorities, which seem to give support to the theory that there may be *de facto* officers without *de jure* offices, are not really in point, because they might have been decided without regard to this theory. But it seems to the writer that the boot may properly be put on the other leg. It is true that the earlier cases do not involve the point and therefore do not support the theory; but

¹ Dillon, *Municipal Corporations*, § 276.

it is equally true that the great majority of the later cases in which the contrary theory is asserted do not turn upon the point in question and therefore give no support to this latter theory. If the theory advocated in the earlier cases is founded upon public necessity and convenience, and if this theory is not inconsistent with the later decisions, it may stand despite opposing dicta. It is submitted that upon the facts in each case and the disposal of the case by the courts all the decisions but one may be reconciled.

In dealing with the cases it will be advantageous first to note and set aside those in which there was found to be a *de jure* office, and then to collect and examine those in which there was none.

(1) To the first group belong *Brown v. Lunt*,¹ *State v. Muir*,² *People ex rel. Ballou v. Bangs*,³ *Brown v. O'Connell*,⁴ *State v. Carroll*,⁵ *Ex parte Strang*,⁶ *Carleton v. People*,⁷ *Samuels v. Drainage Commissioners*,⁸ *Leach v. People*,⁹ *Chicago and N. W. R. R. Company v. Langlade City*¹⁰ and *In re Ah Lee*.¹¹ These are frequently cited as leading authorities against the doctrine of the *de facto* office because of their strong declarations against it. On examination it will, however, be discovered that they are all cases of *de facto* officers wrongly holding an office of which the existence and the constitutionality are unquestioned. Accordingly all the statements made by the courts in these cases that there can never under a constitutional government be a *de facto* officer if there is no *de jure* office for him to occupy are irrelevant, because in each of these cases the decision is based on the fact that there is a *de jure* office. On any other theory some of these cases would stand for exactly the opposite: *i. e.* if it were not for the *de jure* character of the office, the *de facto* character of the officer could have been upheld upon the theory of his holding a *de facto* office.

The case of *Nofire v. The United States*¹² is valuable as showing how little is necessary in order to validate the acts of one il-

¹ (1854) 37 Me. 423.

² (1855) 20 Mo. 303.

³ (1860) 24 Ill. 184.

⁴ (1870) 36 Conn. 432.

⁵ (1871) 38 Conn. 449.

⁶ (1871) 21 Ohio St. 610.

⁷ (1862) 10 Mich. 250.

⁸ (1888) 125 Ill. 536.

⁹ (1887) 122 Ill. 420.

¹⁰ (1883) 56 Wisc. 614.

¹¹ (1880) 5 Fed. Rep. 899.

¹² (1897) 164 U. S. 657.

legally in possession of a *de jure* office. It appeared that the appellants were indicted and tried in a circuit court of the United States for the murder of one Rutherford, and that they were found guilty. They claimed that under the treaty between the United States and the Cherokee Indian nation they had the right to be tried by that nation for the murder of an Indian, and they asserted that Rutherford was an Indian by adoption. The case turned on the question whether Rutherford was an Indian. It seems that in order to become by adoption a citizen of the Cherokee nation all that is necessary is to marry a Cherokee woman. This is done according to Cherokee law by getting a marriage license from the clerk of the nation. The appellants showed that Rutherford had obtained a marriage license from one Dannenberg, who had no legal connection with the office of clerk. For a year or more, however, this Dannenberg had been doing odd jobs about the office, aiding the clerk and his deputy in their work, and all his acts as assistant to the clerk had been acquiesced in by the Cherokees. The supreme court held that the license was free from collateral attack, on the ground that Dannenberg was a *de facto* officer.

He was permitted by the clerk and the deputy to sign their names; he was the only person in charge of the office; he transacted the business of the office, and his acts in their behalf and in the discharge of the duties of the office were recognized by them and also by the Cherokee Nation as valid. Under those circumstances his acts must be taken as official acts, and the license which he issued of full legal force. As to third parties at least he was an officer *de facto*.¹

Thus the court holds, in effect, that one who enters upon the duties of a *de jure* office, with acquiescence on the part of the public, is, to persons coming to such public office to transact business in the regular way, a *de facto* officer. In such cases color of title seems to be unnecessary if the pseudo-officer is generally recognized as an officer.

(2) When we pass from this group of cases, in which there was a *de jure* office, to the cases in which there was no office *de*

¹ 164 U. S. 661.

jure and in which it was held that the pseudo-officer was not a *de facto* officer, we find that in almost every case—to be precise, in every case but one—the occupancy of the illegal office was without color of title. In almost every case the office was created by a statute which was ineffective on its face, either by reason of an express constitutional prohibition or because it was obvious that no power existed to create any such office, or the office was on its face illegal under the general laws of the state. Under such circumstances it may be granted that there could be no *de facto* officer, on the simple ground that the person occupying such an office had no color of title.

On the other hand we find a further group of cases in which, although the office did not exist *de jure*, the statute creating the office was not on its face unconstitutional or obviously *ultra vires* of the legislature; and in these cases the occupant of the illegal office was recognized as a *de facto* officer.

Such being the decisions, it seems, advisable to consider, first of all, what is meant by color of title, and when an officer claiming under some sort of title has been considered by the courts to be a mere usurper.

The case of *Hildreth's Heirs v. McIntire's Devisees*¹ arose in Kentucky in 1829. It seems that according to the state constitution there was to be but one court of appeals in Kentucky. The legislature passed an act attempting to abolish the court of appeals ordained and established by the constitution and to create in its stead a new court. This attempt was, of course, ineffectual for want of legislative power. As the court said:

The offices attempted to be created never had a constitutional existence; those who claimed them had no rightful or legal power . . . Their tribunal claimed to derive its origin from the fiat of the legislature. The court of appeals had not been and could not be abolished. Its judges had not been removed from office, and were acting and ready to continue acting as judges.

This decision is directly in accord with the older theory. There was here no color of title. The constitution clearly said that there should be but one one court of appeals. This legal court

¹ (1829) 1 J. J. Marshall, 206, 208.

of appeals was in actual existence when the legislature, without a shadow of right, tried to set up a court of its own. An illegality so patent as this could confer upon persons appointed to the new court no semblance of title. No other decision than that which was rendered is conceivable. But the Kentucky court, after disposing of the case correctly, went on to deliver itself of a statement which can only be considered as dictum, but which must be inserted here, as it is one of the sheet-anchors of the opposing theory.

There can not be more than one court of appeals in Kentucky as long as the constitution shall exist, and that must necessarily be a court *de jure*. When the government is entirely revolutionized and all its departments usurped by force or the voice of a majority, then prudence recommends, and necessity enforces obedience to the authority of those who may act as the public functionaries; and in such a case, the acts of a *de facto* executive, of a *de facto* judiciary or of a *de facto* legislature must be recognized as valid. But this is required by political necessity . . . But when the constitution or form of law remains unaltered and supreme, there can be no *de facto* department or *de facto* office. The acts of incumbents of such departments or office . . . can be regarded as valid only when the government is overturned. When there is a constitutional executive and legislature, there cannot be any other than a constitutional judiciary. Without a total revolution there can be no such political solecism in Kentucky as a *de facto* court of appeals. There can be no such court whilst the constitution has life and power. There has been none such. There might be under our constitution and there have been *de facto* officers. But there never was and never can be under the present constitution, a *de facto* office.

All the above is mere dictum, as the case falls within the older doctrine and was decided substantially in accordance therewith.

Cases that belong in this second group are those of *Town of Decorah v. Bullis*,¹ *State v. McFarland*,² *Ex parte Babe Snyder*,³ *State v. O'Brien*,⁴ *Reddy v. Tinkum*,⁵ *In re Hinkle*,⁶ *Matter of Quinn*,⁷ and *People ex. rel. Baldwin v. McAdoo*.⁸

¹ (1868) 25 Iowa 12.

² (1876) 64 Mo. 58.

³ (1882) 60 Cal. 458.

⁷ (1897) 152 N. Y. 89, 93.

² (1873) 25 La. Ann. 547.

⁴ (1878) 68 Mo. 153.

⁵ (1884) 31 Kan. 712.

⁸ (1905) 110 App. Div. N. Y. 412, 436.

They all state with various degrees of emphasis that there can be no such thing as a *de facto* office; but in each of these cases the statement is again merely *obiter*, because the same decision would be reached under the theory supported in this paper, inasmuch as there was no semblance or color of authority for the creation of the office in question, and therefore it could, of course, not be *de facto*. These cases are distinguishable because either the legislature had assumed to do some act clearly *ultra vires* or on its face contrary to the terms of the constitution, or the office had been abolished or expressly limited or prohibited by act of the legislature, or the legislature had expressly declared that an act creating an office was not to be applicable to such a case as that in question. In none of these cases, accordingly, was there any color of authority for the existence of the alleged office.

The most notable dictum on this point, however, is to be found in the case of *Norton v. Shelby County*.¹ This case has been very generally misunderstood, in spite of the fact that it was freely criticised, six years later, in a circuit court decision.² The facts in the *Shelby County* case were as follows. By the constitution of Tennessee there was, in each county, but one county court. This was composed of the justices of the peace elected in their respective districts in the county. Under the act of March 9, 1867, the governor was given power to appoint county commissioners who were to take the place of this court. The county court was one of the institutions recognized in the constitution of the state. County commissioners were authorities unknown to the constitution and previously unknown to the law of Tennessee. There was no general acquiescence in the change nor any general recognition of the new commissioners. On the contrary, the validity of the act was at once assailed. Within a month after its passage, a bill was brought against the commissioners, and public opposition continued in various forms until the case was finally settled. While litigation to test their authority was pending the commissioners issued county bonds to the amount of \$29,000 and the liability of the county on

¹ (1886) 118 U. S. 425.

² *Comstock v. Tracey* (1891), 46 Fed. Rep. 162.

these bonds became a further subject of controversy. It was held that the commissioners were not *de facto* officers, and that their right to hold the office in question could be attacked collaterally in the suit upon the bonds. It will be seen at once that this case not only does not conflict with the rule supported in this essay, but is fully in accordance with it. There was here no color of title to the office. The act purporting to create the office of commissioner was clearly and on its face contrary to the constitution, as the Tennessee case of *Pope v. Phifer*¹ shows; indeed, it was so clearly unconstitutional that legal measures were taken against the bonds of the appointees within one month after the passage of the act. The opinion of the court, delivered by Mr. Justice Field, says, however:

But it is contended that if the act creating the board was void, and the commissioners were not officers *de jure*, they were nevertheless officers *de facto*, and that the acts of the board as a *de facto* court are binding on the county. This contention is met by the fact that there can be no officer, either *de jure* or *de facto*, if there be no office to fill. As the act attempting to create the office of commissioner never became a law, the office never came into existence. Some persons pretended that they held the office, but the law never recognized their pretensions . . . and the commissioners were held to be usurpers. The doctrine which gives validity to the acts of officers *de facto*, whatever defects there may be in the legality of their appointment or election, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in the apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result if in every proceeding before such officers their title could be in question. But the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an officer who holds no office, and a public office can exist only by force of law. This seems to us so obvious that we would

¹ (1871) 3 Heiskell, 682.

hardly feel called upon to consider adverse opinion on the subject, but for the earnest contention of plaintiff's counsel that such existence is not essential, and that it is sufficient if the office be provided for by any legislative enactment, however invalid. Their position is that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet it by any argument beyond this statement. An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation as inoperative as though it had never been passed.¹

The court, it seems, goes too far in disagreeing with the view which it opposes. Of course it is clear that it is not merely because of the fiat or declaration of the legislature that the acts of a claimant to office acquire validity; but it is not necessary, in order to disagree with this view, to hold that an unconstitutional act has no validity at all, no matter what the act may be nor how its unconstitutionality arises. In this case the powers and functions sought to be conferred upon new officers were already vested, in accordance with the constitution and the laws, in other hands long recognized and competent, which would be deprived of authority if the acts of the claimants were to be declared valid for the time in which they were in office. While the case before the court was properly decided, the reasoning upon which the decision was based would lead, in cases where the unconstitutionality of a legislative act was not evident, to inequitable results. The broader theory, holding that if there is sufficient color of authority in the legislative act it will protect the incumbent as a *de facto* officer, seems to furnish a fairer rule. In Justice Field's reasoning the principles underlying the *de facto* doctrine are misconceived. This was recognized, some years later, by an inferior branch of the same court. While the circuit court, in *Comstock v. Tracey*,² refused to hold *contra* to the decision of the supreme court in the Shelby County case, it took exception to parts of the opinion. Quoting

¹ 118 U. S. 441, 442.

² (1891) 46 Fed. Rep. 162.

Justice Field's statement that "the acts of one filling a *de facto* office have no validity at all in law," Judge Thomas said: "That question is not here necessarily involved, and I do not pass upon that question."

All the leading cases in which it is asserted that there can be no *de facto* officer unless there is a *de jure* office for him to fill have now been considered; and in every case¹ in which this assertion is made it has been shown either that the point was not involved, because the office was actually existing *de jure*, or that the consideration of this point was unnecessary, because the decision could have been based on the rule that a *de facto* officer must have color of title.

(3) A third and distinct group of decisions is found in cases where there is no constitutional office in existence, but where the officer is protected both from collateral and from direct attack on the ground that his office is part of a municipal organization which is in existence unattacked by the state.² The courts have repeatedly refused to permit the *de jure* character of any municipal corporation to be questioned through collateral attacks upon its officers, and have sheltered such officers behind the *de facto* rule. They declare the existence of municipal corporations to be unimpeachable in all collateral suits and open to attack only in *quo warranto* proceedings brought in behalf of the state. *Steelman v. Vickers*³ is a typical example of the operation of the *de facto* rule in this class of cases. It appeared, in this case, that a municipal corporation was created by methods not conforming to the ordinary statutory requirements and by an act which was unconstitutional. The action was on a writ of *quo warranto* brought by a private person against an officer of the corporation because of irregularities in the defendant's title to office. The court held that the office of a *de facto* municipality could not be ousted on the ground that the corporation

¹ Except *Flaucher v. Camden* (1893), 56 N. J. L. 244, which is discussed *infra*.

² See *State v. Stevens* (1878), 21 Kansas, 210; *Trumbo v. People* (1874), 75 Ill. 561; *Merchants National Bank v. McKinney* (1891), 2 So. Dakota, 106; *Comanche County v. Lewis* (1888), 35 Fed. Rep. 343; affirmed (1889), 133 U. S. 196.

³ (1889) 51 N. J. L. 180, 181.

had no legal existence. This latter question, it was said, cannot be raised by a private person, directly or indirectly, but only by the attorney-general :

[Private persons can not] call into question the existence of one of these bodies that are public corporations *de facto* if not *de jure*. Such an endeavor is obviously possessed of all the impolicy that forms the basis of the prohibition alluded to ; for that basis is that it is highly inexpedient that these municipalities, being the depositories of a part of the governmental power of the state, should have their very being put at hazard whenever any member of the community sees fit to make the assault. Being public institutions it was determined that their existence was not to be challenged except by the state through its attorney-general, he acting *ex officio* as the representative of the public, and that in such a procedure his name could not be used *pro forma* by a private relator.

Were such attacks allowed, one officer after another might be removed on private initiative, and the municipality might be left without any officers. This would be practically a dissolution of the municipal corporation ; and since the legal existence of municipal corporations may not be directly attacked by individuals, it is not admissible that their existence should be indirectly threatened by private attacks upon the title of their officers. It follows that all the officers of a *de facto* municipal corporation are deemed to be in possession of *de jure* offices and are not removable by any other means than by proceedings brought in behalf of the state against the corporation itself. But the conclusion derived from this class of cases is to be strictly confined to offices in a *de facto* local corporation.

(4) Before turning to the cases in which the broader doctrine is expressly affirmed, we may consider a Pennsylvania case, *Campbell v. Commonwealth*,¹ in which it seems to have been applied. In the court of Fayette county, two associate judges, not learned in the law, sat with the presiding judge and participated in the trial and sentence of three persons for arson. They were elected and commissioned as associate judges. It was objected in 1879

¹ (1880) 96 Pa. St. 344, 347.

against the validity of the conviction that there was no power under the constitution to elect associate judges, though this power had existed prior to 1874. It was held, however, that the associate judges were officers *de facto*. The court said:

Under due forms of law they hold their offices by title regular on its face. They are performing the duties thereby imposed on them and enjoying the profits and emoluments thereof. Thus they are judges *de facto*, and as against all parties but the commonwealth they are judges *de jure*. Having at least a colorable title to these offices, their right thereto cannot be questioned in any other form than by *quo warranto* at the suit of the commonwealth.

Inasmuch as it is here affirmed that, irrespective of the constitutional existence of the offices to which they were chosen, these judges, having color of title, were *de facto* officers, this case seems directly in point. In support of its position the court cited the case of *Clark v. Commonwealth*.¹

In the case *Adams v. Lindell*,² which arose in 1878 in Missouri, it was held that the rule supporting the acts of *de facto* officers was one of policy, and that it might be applied although the office itself had legally ceased to exist. When the fact that an office had been abolished remained unknown, owing to an erroneous announcement in the election returns, and the person occupying the office was not a mere usurper but held under such color of right as to justify men in concluding that he was an officer, the acts of such person, done after the abolition of the office but before the fact of its abolition was known, might be treated as valid for the purpose of supporting contracts made with him as an officer. This decision was fully approved by the supreme court of Missouri. The same decision was reached on a very similar set of facts in the case of *Simpson v. McGonegal*.³

A similar decision was rendered in Minnesota. It seems that in 1881 a bill presented to the legislature of Minnesota was enrolled, voted on, signed by the presiding officer of each house, approved by the governor and promulgated with the other laws

¹ (1858) 5 Casey, 29 Pa. St. 129.

² (1878) 5 Mo. App. 197; approved (1880), 72 Mo. 198.

³ (1893) 52 Mo. App. 540.

of the session. After a lapse of two years it was discovered from an examination of the journals of the legislature that this law did not have a two-thirds vote in each house, as required by the constitution. In the case of *State v. Gould*¹ the law was accordingly declared void. The case of *Burt v. Winona etc. Railway Company* first arose and was decided in the court of Mankato, which court was established by this invalid act of 1881. The attempt was made to disaffirm the judgment of the Mankato court on the ground that this court, being established by a void law, was without jurisdiction. It was however held by the supreme court of Minnesota² that the law was *prima facie* valid and that the court created by it was *prima facie* legal. The supreme court said:

There may be *de facto* courts or officers, the legality of whose existence cannot be questioned except in a direct proceeding by the state for that purpose. [The court determines] to lay down this proposition, that where a court or office has been established by an act of the legislature apparently valid, and the court has gone into operation or the office is filled and exercised under such act, it is to be regarded as a *de facto* court or office, in other words, that the people shall not be made to suffer because misled by the apparent legality of such public institutions.

The decision is based on authorities cited, on the general principle of upholding the acts of persons who are regarded as public officers and are exercising public powers, and on "the great public mischief that might sometimes arise but for the application of the rule to courts." The case illustrates the point that the considerations of public policy which have led to the recognition of *de facto* officers lead also to the recognition of *de facto* offices.

This case was closely followed, in 1891, by the federal circuit court for the southern district of Minnesota, in *Comstock v. Tracey*.³ The federal court decided that where an act purporting to establish a court of common pleas of Hennepin county had been duly enrolled, signed by the presiding officers of each house, approved by the governor and promulgated with the

¹ (1883) 31 Minn. 189.

² (1884) 31 Minn. 472, 477.

³ (1891) 46 Fed. Rep. 162.

other laws of the session, and was thus valid on its face, the court would presume that it was legally enacted and would not, in a collateral proceeding in which the validity of a judgment in the Hennepin county court was questioned, resort to the journals of the two houses to ascertain whether the act had obtained the two-thirds vote required by the constitution. In this case the court followed the rule laid down in *Norton v. Shelby County*,¹ that a federal court must follow state decisions relating to rules of property and matters of local concern, but it refused to accept the opinion expressed in this case that "there can be no officer, either *de jure* or *de facto*, if there be no office to fill," saying that this latter question was not involved, since the case at bar was governed by the rule of following the state adjudications. In effect, the decision is in accord with the broader doctrine and is in conflict with the dictum of Mr. Justice Field.

In the case of *State v. Gardner*,² the defendant was indicted for attempting to bribe a city commissioner of Akron. The defendant demurred to the indictment on the ground that it was based upon a statute declaring it to be a crime to attempt to bribe any municipal officer, and that the city commissioner was not an officer because the act creating the office of city commissioner was unconstitutional. It was decided that the constitutionality of the act creating the office could not be brought into question collaterally in any such proceeding as was then before the court. In this case the act had been in force for over three years and had never before been questioned; and it would have been impracticable and against public policy to allow it to be impeached collaterally after this acquiescence on the part of the public. The court pointed out that the rule as to *de facto* officers was never one of logic, but always depended upon necessity and the protection of the public. One passage is particularly worth quoting:

We think that that principle of public policy, declared by the English courts, three centuries ago, which gave validity to the official acts of persons who intruded themselves into an office to which they had not been legally appointed, is as applicable to the conditions now presented

¹ (1886) 118 U. S. 425.

² (1893) 54 Ohio St. 24, 33, 49.

as it was to the conditions that then confronted the English judiciary. We are not required to find a name by which officers are to be known, who have acted under a statute that has been subsequently declared unconstitutional, though we think such officers might aptly be called "*de facto* officers." They actually performed official acts authorized by a statute solemnly enacted by the law-making department of the government. Such a statute is presumed to be constitutional . . . Courts in the practical administration of justice should regard the substance of things, and deal with the conditions as they actually exist. Here are grave and important official acts, actually performed by virtue of an office created under the provisions of a statute regularly enacted by the branch of the government to which the power to make law has been delegated by the constitution ; there is a clearly established legal presumption of its validity. The public in its organized capacity, as well as private citizens, has acquiesced in and submitted to their authority. Such circumstances are sufficient to give such color to their title as to make them *de facto* officers ; but whether they fall within the previously existing definition of such officers or not, their official acts thus performed fall within the protection of that principle of public policy which defends them against collateral attack, and therefore the question of the constitutionality of the statute in question was not before the court of common pleas.

After alluding to the case of *Norton v. Shelby County* and distinguishing that case from the present, Judge Spear, in a concurring opinion, goes on to say :

It is sought to dispose of this case by use of the phrase that there can be no officer *de facto* unless there is an office to fill. The proposition begs the question. The obvious answer is that there is an office to fill whenever our law-making power, exercising its authority to create a constitutional office, by a duly enacted and promulgated statute, ordains that there shall be such office, and it remains an office until the act is repealed or held unconstitutional by a court of competent authority in a proceeding in which the one holding the office is a party, who in the meantime, his election or appointment being regular, and the public acquiescing in his discharge of the duties, is an officer whose title can be questioned only by the state itself.

The conclusion to be drawn from this fourth group of cases—a conclusion with which none of the decisions previously

noted is in conflict—is that where there is no *de jure* office, there may be a *de facto* officer, in the sense that his acts cannot be questioned collaterally, if the incumbent enters under sufficient color of title, as for example, under an act of the legislature which is not clearly on its face unconstitutional in the manner of creating the office or in the method of filling it. Perhaps a further condition should be added, *viz.* acquiescence by the public; for if there be no public acquiescence in the officer's assumption of authority, if on the contrary the question of the validity of his tenure be promptly raised, this will furnish very strong evidence that the unconstitutional act was on its face unconstitutional, and the courts may well consider such evidence conclusive. The contention that in the absence of a *de jure* title to office public acquiescence is necessary to make the incumbent a *de facto* officer has at least this much negative support, *viz.* that no case has been found upholding the acts of such an incumbent without public acquiescence for some length of time. But since, conversely, in no reported case does it appear that public acquiescence was lacking when an incumbent assumed office under a legislative act not on its face unconstitutional, the question has not been squarely presented to the courts.

Before concluding this examination of the cases it is necessary to advert for a moment to the single case which seems irreconcilable with the broader rule. This the case of *Flaucher v. Camden*, decided in the New Jersey supreme court.¹ It appears that Flaucher was convicted by the police judge of Camden on a charge of selling liquor without a license. Flaucher had a certificate granted by the county board of license commissioners of Camden county. If this was valid, Flaucher was illegally convicted. The board was created by an act of legislature which, not long before Flaucher's conviction, was declared to be unconstitutional. The question was whether a license granted by the board established by that act could be invoked for any purpose. Flaucher insisted that the commissioners were *de facto* officers at the time the license was granted, and

¹ (1893) 56 N. J. L. 244.

that their act was therefore valid in respect to the public and to third persons. The court held, however, that "an office created by an unconstitutional statute can afford no support to the acts of its incumbents. The board of license commissioners was a new and distinct body, and when its official existence is wiped out, there is no official support for the licenses granted by its incumbents." The court makes a distinction between unconstitutionality as to the method of filling an already existing office and unconstitutionality in regard to the creation of a new office. In the latter case, however, it affirms that the incumbent of the supposed office can not be a *de facto* officer. To the writer the decision in this case seems distinctly inequitable, since Flaucher acted in conformity with what appeared to be the law and was entitled to suppose his license valid; and the fact that the principle on which this decision is based would necessarily involve a similarly unsatisfactory result in all similar cases appears to be a valid argument against the correctness of the principle.

As regards the question: What constitutes a *de facto* officer when there is no office *de jure* for him to fill? it may be conceded that no hard and fast rule can be laid down. It is a question of color of legal authority and of the degree of color; and such questions are questions of fact in each particular case.

The results reached in the foregoing examination of cases may be summed up as follows:

(1) If there is a *de jure* office in existence, anyone (*a*) who enters on such office with color of title as to his appointment or election, or (*b*) who enters, acts as officer and is recognized as such by the public, is a *de facto* officer. In this class of cases the legal existence of the office confers color of title upon anyone who has the recognition and acquiescence of the public.

(2) If there be no office in existence *de jure*, and the claimant enters with no color of title, under an act of the legislature which is on its face clearly unconstitutional, he is not a *de facto* officer but a mere usurper.

(3) If there be no *de jure* office, and the incumbent enters under an unconstitutional act of the legislature, but one which is not clearly and on its face unconstitutional, and if such in-

cumbent does not otherwise lack color of title, he is a *de facto* officer. Acquiescence on the part of the public may, perhaps, be an additional requisite.

Contra : the single case of *Flaucher v. Camden*, and a strong current of dicta.

(4) The officers of *de facto* municipal corporations are in a distinct class, and so long as the state itself does not attack their title, they are treated as *de jure* officers.

III

The basis upon which the recognition of *de facto* officers has always rested is the necessity of protecting the public in dealing with persons acting as public officers. The recognition is carried no further than the public interest requires; *de facto* officers are not permitted to build up any rights for themselves, such as a right to compensation for work done in the office.¹ Conversely, however, the recognition should be accorded whenever it is necessary for the protection of the public. There seems accordingly to be no sound reason for the distinction drawn by the New Jersey courts, upholding the acts of the unlawful incumbent when the office is constitutionally created but invalidating his acts as those of an intruder when the office is found to be unconstitutional. The public interests which require the validation of the acts of the unlawful incumbent are in both cases the same. Why, then, should not the courts recognize *de facto* office, when such recognition is necessary to uphold the acts of the officer, as readily as they recognize the *de facto* officer in illegal possession of a *de jure* office? In *Burt v. Winona etc. Railway Company*,² the Minnesota court did not hesitate to take this position. The court said :

Taking even the narrowest definition of an officer *de facto*, viz. that he is one who is exercising the duties of an office under color of legal right to the office, the reasons that justify the doctrine apply with equal force to a court or office where the same may be said to exist under color of right, that is, under color of law.

¹ *Dolan v. Mayor* (1877), 68 N. Y. 274.

² (1884) 31 Minn. 47.

In either case, of course, the *de facto* doctrine sets up a legal fiction; but the fiction is as useful, not to say necessary, in the one case as in the other.

If we transfer the discussion from the field of expediency to that of logic, the advocates of the narrower doctrine are in no better case. To restrict the recognition of a *de facto* officer to instances in which a constitutionally created office exists is to draw a distinction which seems logically untenable. If an "unconstitutional law can confer no authority and create no rights," how can an unconstitutional law which provides for filling an office confer validity upon the acts of the incumbent? It is quite as much of a "political solecism" to uphold the acts of one who unconstitutionally intrudes himself into a legally existing office as to validate the acts of an alleged officer who was duly appointed or elected to a new office established by a legislative act which failed of passage by a few votes—which fact did not appear at the time—and who, under this act, held office with public approbation for several years.

The restriction which has always been imposed as regards the recognition of *de facto* officers, *viz.* that the incumbent must not be a mere usurper without color of authority, rests upon the same basis upon which recognition rests, *viz.* public policy. There is every reason why the public should put confidence in those persons who have colorable authority; there is no reason why the public should put its confidence in persons who are manifestly without authority. To apply the older and broader doctrine to the office as well as to the officer, to say that the public is entitled to assume that an office exists when it is established under color of law, is a direct development of the original doctrine. This argument is so well put by a Missouri court, in an early case to which reference has already been made,¹ that a short quotation from the opinion is in point. The court argues as follows:

Where the office legally exists and the officer is merely a *de facto* officer, there is a violation of law. The officer not being legally such, his

¹ *Adams v. Lindell* (1878), 5 Mo. App. 197.

acts are, apart from the principles of validation, of no legal effect ; but if to this state of things we superadd the element of non-existence of the office, what essential difference can this make? The question is as to the validity of the acts of a certain man, claiming to be a public officer. If these acts are invalid they certainly cannot be made more invalid by the addition of another quantity. "Contrary to law" and "invalid" do not admit of degrees of comparison. The act of the so-called officer being thus contrary to law, as he has no right to the office, the *de facto* principle is applied ; thus an otherwise void act is validated, not because of any character or quality attached to the so-called officer or his office, but because this is necessary to preserve the rights of third persons and keep up the organization of society. The rule is based merely on policy, and its origin and historical development show that it is founded in comparative necessity . . . It is evident that the necessity which creates the rule of validation may exist in precisely the same way and degree where there is no legal office as where there is merely no legal officer ; and it is further evident that to apply the principle to cases where there is no legal office is taking no new or further step ; for, as above said, the act being already invalid, it cannot be any more invalid where there is no legal office. Why, then, should the rule suddenly halt when both logic and necessity require it to proceed?

The acts of a mere usurper are not validated, for the "apparent circumstance of color or reputation leading men to suppose he is a legal officer does not exist."¹

The reason for upholding the acts of *de facto* officers is accordingly extra-legal: the rule is *contra tenorem juris*. The *de facto* officer, according to the ancient definition of the English law, was an incumbent not legally qualified. There was a flaw in his title. The English courts on grounds of public necessity gave validity to the official acts of men who intruded themselves into offices by methods not in accordance with the law. It is submitted that the same principle should be applied to-day as regards persons who act as officers and in whose title to office there is some flaw, no matter if the flaw be in the method of creating the office. It seems that on grounds of public policy the acts of such officers should be safe from collateral attack,

¹ 5 Mo. App. 202.

irrespective of the question whether they come strictly within the class of persons who were at first described as *de facto* officers.¹

It seems that the grounds on which a man without legal qualification is held to be a *de facto* officer, if he has sufficient color of title, may with equal logic and justice be invoked as regards the office itself. If only there be sufficient color of law, the office may be considered a *de facto* office, and an appointment or election to such an office under sufficient color of title may be held valid as to third persons and the public and unassailable in collateral proceedings. This view is, as we have seen, fully supported by the cases, which fall readily into the four classes distinguished above. From these cases it is clear that where an incumbent enters under a legislative act which is *on its face* clearly unconstitutional, he is not a *de facto* officer, but a mere intruder and usurper, without color of authority. Where, on the other hand, color of authority exists, it seems impossible to deny, either upon principle or upon the authority of decided cases, that there may be a *de facto* officer even in the absence of a *de jure* office.

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¹ *Simpson v. McGonegal* (1893), 52 Mo. App. 540, 547.